United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

To be argued by
MICHAEL C. DEVINE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7239

P/S

THE ANDERSON COMPANY and ALICE SCRANTON EASTMAN ANDERSON,

Plaintiffs-Appellants,

-against-

JOHN P. CHASE, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

SCHWENKE & DEVINE
Attorneys for Plaintiffs-Appellants
Office and Post Office Address
230 Park Avenue
New York, New York 10017
Telephone: (212) 725-5360

MICHAEL C. DEVINE
Of Counsel

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Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

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ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT APPELLANTS WAIVED THEIR RIGHT TO RECEIVE INVESTMENT SUPERVISORY SERVICES

Appellee's brief is simply a statement of reliance upon the district court decision, and therefore it requires no reply. However, its treatment of the waiver issue is enlightening. Appellee does not claim that the district court was correct in concluding that appellants waived their right to receive the full panoply of "investment supervisory services", rather it claims that the district court did not reach such a conclusion.*

This argument is totally new -- the third of three distinct and inconsistent arguments used by appellee in this litigation. Initially appellee claimed that at all times it rendered to the Anderson accounts full investment supervisory services. (14a-16a). Then, commencing with Mr. Chase's pre-trial deposition, it claimed that in December, 1968, or January, 1969, Mr. Anderson waived prospectively the right to full counselling and agreed to accept something less. It was this argument which the district court appears to have adopted. (610a-612a). Now, appellee claims, for the first time, that it never rendered investment supervisory services to the Anderson accounts and that from the beginning

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* Appellee asserts that "the district court properly concluded that at all times appellants received exactly the service they requested". (Appellee's Brief, p.4).

of the relationship all Mr. Anderson wanted, and all appellee provided, was a "flow of information".

This latest argument is a bold affront to the record, which demonstrates that in November, 1966, defendant undertook to render investment supervisory services to the Anderson accounts. Consider the evidence:

(1) In their face-to-face meeting in September, 1966, Mr. Chase described for Mr. Anderson the nature of the supervisory services which defendant would render; namely, its usual and customary supervisory services, not some lesser type of service involving only a "flow of information".*

(2) In September, 1966, defendant gave Mr. Anderson its standard brochure which describes its services as exclusively those of "investment counsel". (366a).

(3) Mr. Chase refused to accept counselling responsibility for the Anderson accounts unless they met defendant's $500,000 minimum size requirement for regular investment counsel accounts. (179a).

(4) The Anderson accounts were charged fees based upon a charge schedule which applied to all of defendant's supervised accounts. Indeed the fee charged to plaintiff

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* In the district court decision (601a) and in appellee's brief (p.4) it is asserted that Mr. Anderson sought a "flow of information". This assertion is not consistent even with Mr. Chase's testimony, which was that Mr. Anderson sought a "flow of advice" (182a), much more than "information" and precisely that which defendant unilaterally ceased to provide. Indeed Mr. Chase admitted that defendant was obligated to give "recommendations" (200a), and that Mr. Anderson was not to receive "information" (212a).

was increased 150% in early 1968. (438a; 487a).

(5) Defendant's formal filings with the Securities and Exchange Commission ("SEC") stated that defendant had no clients to whom it rendered less than investment supervisory services. (486a; 490a).

(6) Before trial Mr. Inches testified unequivocally that the Anderson accounts were "supervised" accounts. (Point IV of Appellants' Brief).

(7) Every invoice which defendant rendered to the Anderson accounts, over more than four years, alleged rendition of "investment counsel" services. (R.436).

(8) In its answer to the complaint defendant admitted that "on or about November 1, 1966, defendant, John P. Chase, Inc., commenced counselling the accounts,..." [emphasis added]. (14a).

Of more significance than all of the above-enumerated evidence is the written contract between the parties. (385a). In 1966 defendant prepared and submitted to Mr. Anderson its standard form of contract for supervisory accounts, reciting the nature of the services to be rendered. (375a). Mr. Anderson executed and returned the contract. Other than the above-referenced increase in fee, the contract was not modified or supplemented in any way during the four-plus years that the counselling relationship remained in effect. Nor did defendant every request any alteration of the written contract.

Appellee cannot claim that the written contract required rendition of less than "investment supervisory services" because the very same form of contract is an exhibit to its formal filings with the SEC in which it states that it renders only "investment supervisory services". (487a).

For appellee to assert, in the face of this record, that it never was obligated to render investment supervisory services to the Anderson accounts is a mark of the same cavalier attitude which, in retrospect, permeated its relationship with those accounts from the outset.

Appellee argues that this unconcerned attitude is acceptable in light of Mr. Anderson's knowledge and sophistication. (Appellee's Brief, p.4.). This is false, as the SEC has pointed out. Annexed as an exhibit to this brief is an inquiry letter to the SEC and the official response, in which the SEC states not only that the meaning of "investment supervisory services" does not change as a function of the degree of sophistication of the counsellor's clientele but also that the counsellor's business take into account such relevant factors as the commitments of the client, and his (or her) personal and family obligations.

CONCLUSION

The district court found that defendant did not

render "investment supervisory services" to the Anderson Accounts. Appellee's brief acknowledges the correctness of that conclusion by stating that "appellants received exactly the service they requested", "a flow of information". (Appellee's Brief, p.4).*

Thus the essential issue before this court is whether the district court erred in construing the agreement between the parties in such a way as to relieve defendant of its obligation to render "investment supervisory services". At trial appellants did not assert the parol evidence rule because defendant did not offer any probative evidence of an agreement contrary to the written contract. Nevertheless, the district court concluded, erroneously, that a contrary agreement existed,** and that the obligations imposed on defendant by the written contract had been waived.

Cognizant of the impossibility of the task, appellee does not defend the district court's conclusion that compliance with the written contract had been waived. Instead it takes a new tack, claiming that the written

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* Mr. Chase made the same admission; for instance -- "[w]hat we wanted to avoid....was making positive recommendations...". (213a).

** Had there been oral evidence of such an agreement it would have been excluded by the parol evidence rule. See pages 53-55 of appellants' main brief for a discussion of the testimony which purportedly supports the district court's conclusion.

contract never meant what it said,* and therefore there was nothing to waive; that is, defendant never was obligated to render "investment supervisory services" to the Anderson accounts. As demonstrated above, this argument is as unfounded as the waiver argument.

Defendant, by written contract, undertook to render "investment supervisory services" to plaintiffs. It failed to do so, as the district court found, and as appellee concedes. Thus plaintiffs are entitled to judgment. It respectfully is requested that the judgment of the district court be reversed and that the action be remanded for assessment of damages.

Respectfully submitted,

SCHWENKE & DEVINE
Attorneys for plaintiffs-
appellants

Of Counsel:

Michael C. Devine
David M. Butowsky
(Gordon Hurwitz
Butowsky & Baker)

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* However, in its answer to the complaint defendant referred to the written contract for the terms of the agreement between the parties. (13a).

PARKER & SEELY
ATTORNEYS AT LAW
EIGHTH FLOOR SECURITY BANK BUILDING
886 NORTH MAIN STREET
SANTA ANA, CALIFORNIA 92701

AREA CODE 714
TELEPHONE 547-8801

JOHN R. PARKER
HALL SEELY
THOMAS WELLS
THOMAS W. ALLEN

January 15, 1971

Securities and Exchange Commission
Washington, D.C. 20549

Attention: Section of Investment Adviser Registration
Henrietta H. Gandy, Chief

RE: Analytic Investment Management, Inc.

Dear Mrs. Gandy:

The specific purpose of this letter is to solicit from your office two specific opinions relating to the conduct of an Investment Advisory Service. The specific questions raised by our clients are as follows:

1. Under what circumstances may an Investment Adviser use the term "Investment Counsel"?

In raising this question, our clients are aware that Section 208 (c) of the Investment Adviser's Act of 1940 prohibits an Investment Adviser's use of the term "Investment Counsel" unless a substantial part of his business consists of rendering investment supervisory services. Our clients are also aware that "investment supervisory services" are defined as "the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client."

The client's response to questions 18(a) and (b) of Form ADV (a copy of which response I enclose) clearly negates use of the term "Investment Counsel" in that it states the "investment supervisory services will constitute only a minor share of applicant's activities."

However, applicant's response was dictated principally by the prospect that applicant's major activities will be in connection with advice to sophisticated and substantial investors and institutional trustees. However,

the advice rendered by our clients is necessarily continuous and greatly emphasizes the "individual" needs and circumstances of the client for the client account, even though that client might be a fund or institution. Upon reflection, our office and our clients have come to the conclusion that use of the term "Investment Counsel" by Analytic Investment Management, Inc. would be proper. However, before commencing use of the term, we thought it advisable to seek the approval or guidance or your office. We would appreciate your comments or reference to authority on this issue. If you agree continuous and "individual" services rendered with regard to institutional clients, funds or portions of funds qualify as investment supervisory services, we would then proceed to amend the existing registration to make clear registrant's intention to furnish such services to all of its clients.

2. What constitutes an improper testimonial?

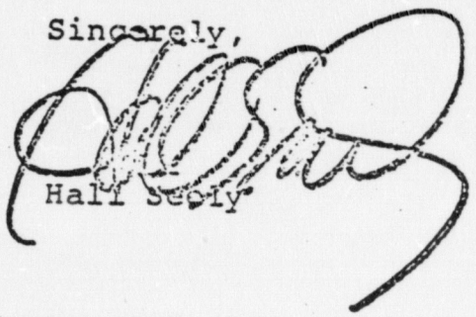
Our clients are familiar with S.E.C. Rules, Sec. 206(4)-1(a)(1) prohibiting any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the Investment Adviser. With the foregoing rule in mind, I attach a copy of a proposed draft of a letter to be directed by the Investment Adviser to prospective clients who are, in fact, personal acquaintances of the principals of the Investment Adviser. We are wondering whether or not the references contained therein to the mutual friend and the statement that he is available to discuss his experiences with the Investment Adviser, constitute a prohibited testimonial. Obviously, the letter itself does not constitute a testimonial and it was the intent of the Investment Adviser that such a referral might furnish the most helpful and accurate information to a prospective client. What difference would it make if the mutual friend became an officer or principal of the Investment Adviser but such fact were clearly disclosed to prospective clients? Your opinion or citation to authority on these questions will be greatly appreciated.

Finally, we wish to know if there exists a single publication or reference work which contains the laws and regulations relating to Investment Adviser registration and activities in each of the fifty states. We thought it possible that your office might have compiled such a

reference work or know of its existence. If you have such information, I would ask that you furnish me with a description of the source material and where it may be obtained.

If these inquiries are not properly directed to your office, I would ask that you forward this communication to the appropriate office. Your assistance in connection with these inquiries is greatly appreciated.

Sincerely,



Hall Seely

aml
Enclosures
cc Analytic Investment Management, Inc.
2182 du Pont Drive, Suite 213
Newport Beach, California 92664

16 40JA

Act INVESTMENT ADVISERS ACT
Section 206 & 208(c)
Rule 206(4)-1(a)(1)
Public Availability March 22, 1971

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FEB 22 1971

Hall Seely, Esquire
Parker & Seely
Eighth Floor Security Bank Building
888 North Main Street
Santa Ana, California 92701

Dear Mr. Seely:

Your letter of January 15, 1971 to Henrietta H. Gandy has been referred to this office for reply.

You request our opinion regarding the use by your client, Analytic Investment Management, Inc. (the Company), a registered investment adviser, of the term "investment counsel" as that term is defined in Section 208(c) of the Investment Advisers Act of 1940. You state that the Company's major activities would be in connection with advice to institutional clients, funds, portions of funds, as well as to, what you term, "sophisticated and substantial investors and institutional trustees."

In our view, the use of the term "investment counsel" by an investment adviser, must satisfy these conditions, irrespective of the identities or kinds of clients he serves: His principal business must be that of an investment adviser, and a substantial part of that business must consist of the giving of continuous advice to clients as to the investment of funds on the basis of the individual needs of each client, taking into account such relevant factors as the nature and amount of other assets and investments, the investment objectives and the commitments of the client, and, in the case of individuals, the nature and extent of insurance, and his personal and family obligations.

Additionally, you request our comments regarding a proposed draft you enclose of a letter to be directed by the Company to certain of its prospective clients. The letter states that a

particular mutual acquaintance would be willing to inform the prospect about the investment experience of his fund with your management of its portfolio.

The use of the proposed letter would, in our view, constitute an offer to provide a testimonial and would therefore be in violation of Rule 206(4)-1(a)(1) of the Investment Advisers Act of 1940, irrespective of the fact that that individual may be or become an officer or principal of your company.

With respect to your request for sources of information regarding the requirements of the several states concerning investment advisers, it may be that the loose leaf services such as those published by Commerce Clearing House or Prentice Hall, might provide such information.

Sincerely,

Ezra Weiss
Chief Counsel

AMason/fwc

cc: Messrs. Pollack, Weiss, Miles, Saperstein, Office of the Chief Counsel, Mrs. H. Gandy, Digest, SFRO, Records

SERVICE OF 2 COPIES OF THE WITHIN

Reply Brief

IS HEREBY ADMITTED.

DATED: Sept 5, 1975

White & Case

Attorneys for dfts-appellees